FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5903

H——L——, on behalf of herself and all others similarly situated,

Appellant,

—v.—

SCOTT M. MATHESON, Governor of Utah, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

JURISDICTIONAL STATEMENT FILED JANUARY 7, 1980.
PROBABLE JURISDICTION NOTED FEBRUARY 25, 1980.

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF AND APPELLANT

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS AND RESPONDENTS

STATEMENT IN LIEU OF DOCKETING STATEMENT

The State of Utah does not maintain a Docketing Statement, accordingly, the following is submitted in lieu of a Docketing Statement in this appeal:

1. April 27, 1978, Complaint filed.
2. April 27, 1978, Motion for Affidavit in Forma Pauperis filed.
3. April 27, 1978, Motion for Temporary Restraining Order and/or Preliminary Injunction filed.
4. May 2, 1978, Motion for Temporary Restraining Order and/or Preliminary Injunction argued to the Court and taken under advisement.

5. May 8, 1978, Memorandum Decision of the Court filed.
6. May 8, 1978, Order Denying Temporary Restraining Order filed.
7. May 17, 1978, Answer filed.
8. May 30, 1978, Hearing held where plaintiff testifies and the Court orally made its decision and ruled that plaintiff could proceed without the appointment of a guardian and could proceed as the representative of a class.
9. December 26, 1978, Findings of Fact, Conclusions of Law and Judgment entered.
10. January 15, 1979, Notice of Appeal filed.
11. December 6, 1979, Opinion of the Supreme Court of the State of Utah filed.
12. December 26, 1979, Notice of Appeal to the United States Supreme Court filed.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

COMPLAINT—Filed April 27, 1978

Plaintiff in the above-entitled matter complains of the defendants and alleges as follows:

1. Plaintiff is a citizen of the United States and a resident of the State of Utah.

2. Defendant Scott Matheson is the Governor of the State of Utah, and as such, under the constitution and laws of the State of Utah, has the duty and responsibility of enforcing the laws of the State of Utah. Article VII, Section 5, Constitution of the State of Utah.

3. Defendant Robert B. Hansen is the Attorney General of the State of Utah, and as such, under the constitution and laws of the State of Utah, has the duty and responsibility of enforcing the laws of the State of Utah. Article VII, Section 18, Constitution of the State of Utah.

4. Plaintiff is unmarried, under eighteen years, resides at home and is a dependent of her parents.

5. Plaintiff H—— L—— is currently pregnant with

an unwanted child. She is in her first trimester of pregnancy.

6. Plaintiff does not wish to inform her parents of her condition and believes that it is in her best interest that her parents not be informed of her condition.

7. The plaintiff has consulted with a counselor to assist her in deciding whether or not she should terminate her pregnancy. She determined, after consultation with her counselor that she should secure an abortion, but was advised when consulting her physician that under the provisions of Section 76-7-304(2), Utah Code Annotated, 1953, he could not and would not perform an abortion upon her without informing her parents prior to aborting her. He advised her that this is required of him by that statute and he is unwilling to perform an abortion upon her without complying with the provisions of the statute.

8. Plaintiff desires that her identity not be revealed or made public because of matters involved in the instant action and accordingly requests this Court to permit her to proceed in this matter under the pseudonym H—— L——.

9. Plaintiff desires to proceed in this matter without the appointment of a Guardian Ad Litem based on her belief that from her consultations with her counselor, her attorney and her treating physician, she understands what is involved in her decision and this action and that the appointment of a Guardian Ad Litem is not necessary.

10. The plaintiff is a member of a class that is so numerous that joinder of all member is impractical, and there are common questions of law and fact as to all members of the class and the claims of H—— L—— as representative are typical of the claims of all members of the class and H—— L——, as a representative plaintiff, will fairly and adequately protect the interests of all members of the class, and the parties opposing H—— L—— have acted and will act on grounds applicable to all members of the class; to-wit, the plaintiff is a minor who is suffering from an unwanted pregnancy which she desires to terminate and she will fairly and adequately

represented a class made up of minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so inasmuch as their physicians will not perform an abortion upon them without compliance with the provisions of Section 76-7-304(2), Utah Code Annotated, 1953.

FIRST CAUSE OF ACTION

11. Plaintiff incorporates by reference paragraphs 1 through 10 above.

12. Plaintiff desires to secure an abortion but cannot obtain an abortion inasmuch as she does not wish her parents to know that she is pregnant, nor does she want them to know that she wants to undergo and will, if permitted to do so, undergo an abortion.

13. Plaintiff is prohibited from obtaining the abortion which she desires because her physician has advised her that under the provisions of Section 76-7-304(2), Utah Code Annotated, 1953, he must notify her parents prior to the performance of an abortion and she is unwilling to have him do so.

14. Plaintiff believes it is her right to have her pregnancy aborted, and her physician, in consultation with her, has advised her that he is willing to perform this abortion if the legal situation and complications that have been effectuated by the enactment of Section 76-7-304(2), Utah Code Annotated, 1953, can be clarified, but he is unwilling to perform the abortion without complying with the statute.

15. Section 76-7-304(2), Utah Code Annotated, 1953, is unconstitutional in that it constitutes an invasion upon the privacy of the plaintiff and each member of the class that she represents, which right of privacy encompasses her right to have an abortion, particularly in the *first trimester of pregnancy*, free from regulation or interference by the State of Utah, and Section 76-7-304(2), Utah Code Annotated, 1953, unconstitutionally infringes with this right in violation of the Fourteenth Amendment to the Constitution of the United States of America.

SECOND CAUSE OF ACTION

16. Plaintiff incorporates by reference paragraphs 1 through 14 above.

17. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, are invalid in that they are an overbroad regulation infringing upon and purporting to regulate the exercise of the right of privacy of the plaintiff and all members of the class that she represents to secure an abortion, during the first trimester of pregnancy as guaranteed to each member of the class she represents by the Fourteenth Amendment to the Constitution of the United States.

THIRD CAUSE OF ACTION

18. Plaintiff incorporates by reference paragraphs 1 through 14 above.

19. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, are constitutionally invalid in that they purport to regulate the right of privacy of the plaintiff and all members of the class that she represents to consult freely with her treating physician and secure treatment where appropriate in the effectuation of an abortion without any compelling State interest in such regulation.

FOURTH CAUSE OF ACTION

20. Plaintiff incorporates by reference paragraphs 1 through 14 above.

21. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, interfere with the doctor-patient relationship with the plaintiff which is protected by her right of privacy under the Fourteenth Amendment to the Constitution of the United States of America by seeking to regulate their relationship with each other by introducing the interests of another party into the relationship and as such improperly infringe upon this constitutionally protected right.

FIFTH CAUSE OF ACTION

22. Section 76-7-304(2), Utah Code Annotated, 1953, by effectuating an unconstitutional statute in violation

of the Fourteenth Amendment to the Constitution of the United States also is in violation of Section 1983 of Title 42, United States Code. Accordingly, the plaintiff is entitled to her costs, including a reasonable attorney's fee, for the maintenance of the instant action.

WHEREFOR, plaintiff requests:

1. A declaratory judgment ruling Section 76-7-304(2), Utah Code Annotated, 1953, is unconstitutional.
2. Each of the defendants, their agents, employees, and those working in concert with them under the laws and regulations of the State of Utah be enjoined and prohibited from enforcing the unconstitutional provisions of Section 76-7-304(2), Utah Code Annotated, 1953.
3. That plaintiff be permitted to proceed in this matter under the pseudonym H—— L——, to proceed without the appointment of a Guardian Ad Litem and to proceed as the representative of the class which she purportedly represents.
4. This action proceed as a class action against the defendants.
5. That plaintiff be allowed to proceed in forma pauperis and all costs, specifically including attorney's fees, be recovered from the defendants.
6. For such further and other relief as this Court deems just and appropriate when advised in the premises.

DATED this 26th day of April, 1978.

/s/ David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Plaintiff

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

H—— L——, being first duly sworn on oath, deposes and states that she is the plaintiff in the above-entitled matter, that she has read the foregoing Complaint, knows the contents thereof and the same are true to the best of her knowledge and belief, and that she is the signator hereto.

/s/ H L
H—— L——

(Jurat omitted in printing)

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

AFFIDAVIT TO PROCEED
IN FORMA PAUPERIS—Filed Apr. 27, 1978

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, H—— L——, do solemnly affirm that owing to my poverty I am unable to bear the expenses of this action or the legal proceedings which I am about to commence, and I verily believe that I am entitled to the relief sought by such action and legal proceedings.

DATED this 27 day of April, 1978.

/s/ H L
H—— L——

(Jurat omitted in printing)

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION—Filed April 27, 1978

H—— L——, plaintiff in the above-entitled matter, by and through her counsel of record, David S. Dolowitz, having heretofore filed a verified Complaint in which she alleges that she is pregnant, desires, after consulting with a counselor, her physician and her attorney, to terminate the pregnancy, and having been advised by her treating physician that he will not perform an abortion upon her unless he provides notice to her parents in conformity with the provisions of Section 76-7-304(2), Utah Code Annotated, 1953, which she alleges is unconstitutional as being in violation of the Fourteenth Amendment to the Constitution of the United States since she has a right to an abortion free from regulation by the State during her first trimester of pregnancy and that she will suffer irreparable injury; to-wit, not being able to secure an abortion if enforcement of the challenged provision is not enjoined so that her physician may proceed to per-

form an abortion upon her without providing notice of said action to her parents, now hereby moves the above-entitled Court to order the defendants to appear and show cause, if any they have, why they, their agents and employees, successors in office and those working under their direction and guidance pursuant to the Constitution and laws of the State of Utah, should not be enjoined and prohibited from enforcing the provisions of Section 76-7-304(2), Utah Code Annotated, 1953, during the pendency of this action.

DATED this 26th day of April, 1978.

/s/ David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Plaintiff

B. Howe

THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE
STATE OF UTAH

H. L., PLAINTIFF

vs.

SCOTT MATHESON, DEFENDANT

MINUTE ORDER:

Case: C-78-2719
Time: 10 AM
Date: 5-2-78

P. Atty David F. Dolowitz p

D. Atty Paul M. Tinker p
Joseph P. McCarthy p

Hon. David K. Winder
Judge

L. J. Batey
Clerk

Shirleyan Henderson
Reporter

William Hyler
Baliff

ACTION TAKEN:

☐ Default Judgment_____Summons
Default of deft entered.
Pltfs Counsel Sw & Ex_____
Doc. proof offered, admitted & withdrawn
Pltf is granted a Judgment as prayed.

☐ Based upon written stipulation of respective counsel, court orders: _____

☐ Based upon motion of pltfs or defts counsel, court orders _____

☐ Based on the failure of deft to appear in response to an order of the court and on motion of pltfs counsel, court orders ——————/——————— shall issue for deft. Returnable ——————— Bail ———————

☐ Based on written stipulation of respective counsel/ motion of plaintiff's counsel, and good cause appearing therefor, court orders the above case be and the same is hereby dismissed without prejudice.

☐ Based on written motion of Pltfs counsel, court orders Deft to ans conc prop on ——————— at ———————

☐ Based on ——— motion of pltfs counsel, court orders Deft to show cause on ——————— at ———————

☐ Based on motion of pltfs counsel, pltfs ——————— is amended and made returnable on ——— at ———

☐ It appearing to the court that a writ of garnishment was issued in the proper form and an answer filed stating that the garnishee is indebted to the defendant. It is ordered that the defendant have and recover of the garnishee ——————————————

———————————————————————

for the use and benefit of the plaintiff in the sum of $———————.

Defts temporary restraining and or a preliminary injunction are argued to the court and taken under advisement.

IN THE DISTRICT COURT
OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

MEMORANDUM DECISION—May 8, 1978

Plaintiffs Motion For Temporary Restraining Order or Preliminary Injunction, having come on to be heard before the undersigned on May 2, 1978, and the plaintiff being represented by her attorney, David S. Dolowitz, and the defendants being represented by their attorneys, Joseph P. McCarthy and Paul M. Tinker, and the Court having heard the arguments of counsel and thereafter having taken the matter under advisement and having considered the matter fully, the Court now renders the following decision.

In this most difficult of cases (and where the arguments on each side are almost equally compelling) and after having carefully considered all of the authorities cited by counsel, the Court concludes that as applied to the facts alleged in the Verified Complaint and as those facts were further amplified by the representations of Mr. Dolowitz at the May 2. 1978 hearing, that 76-7-304(2) U.C.A. 1953, as amended, is not unconstitutional

under the Fourteenth Amendment to the United States Constitution and as constituting a violation of the plaintiff's right to privacy. It is further the opinion of the Court that said statute and as applied to these facts, does not interfere in a legally impermissible manner with the physician-patient relationship, nor is it in violation of Section 1983 of Title 42, U.S.C.

Although a state may not regulate or interfere, in the case of an adult woman with that woman and her physician's decision to terminate an unwanted pregnancy by abortion in the first trimester of pregnancy (*Roe* v. *Wade*, 410 U.S. 113 (1973), it is the opinion of this Court that neither that decision nor any other decision of the United States Supreme Court or other court whose decisions are binding upon this court (including *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 53 (1976), precludes a state from enacting legislation of the kind involved here and which in the case of a *minor woman* requires the woman's physician to notify her parents before undertaking to perform an abortion upon her. This is so under the facts involved here where the woman in question is age 15, unmarried, resides at home with her parents and is dependent upon them for support and where the identity of the parents is either known to the physician or easily ascertainable by him. Further, and in the instant case, there has been no special showing of detriment that might result if the parents were notified and excepting that plaintiff has alleged in her complaint that she "does not wish to inform her parents of her condition and believes that it is in her best interest that her parents not be informed of her condition".

Accordingly, plaintiff's Motion For Temporary Restraining Order or for Preliminary Injunction is hereby denied and defendants' attorneys are to prepare an appropriate order in accordance with this decision.

Dated this 8 day of May, 1978.

/s/ David K. Winder
DAVID K. WINDER
District Judge

Mailing Certificate (omitted in printing)

B. Howe

THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE
STATE OF UTAH

H. L., ET AL., PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, DEFENDANT

MINUTE ORDER:

Case: C-78-2719
Time: —
Date: 5-8-78

P. Atty _____

D. Atty _____

Hon. David K. Winder
Judge

L. J. Batey
Clerk

Shirleyan Henderson
Reporter

William Hyler
Baliff

ACTION TAKEN:

☐ Default Judgment_____Summons
Default of deft entered.
Pltfs Counsel Sw & Ex_____
Doc. proof offered, admitted & withdrawn
Pltf is granted a Judgment as prayed.

☐ Based upon written stipulation of respective counsel, court orders: _____

☐ Based upon motion of pltfs or defts counsel, court orders _____

☐ Based on the failure of deft to appear in response to an order of the court and on motion of pltfs counsel, court orders ——————/—————— shall issue for deft. Returnable ———— Bail ————

☐ Based on written stipulation of respective counsel/ motion of plaintiff's counsel, and good cause appearing therefor, court orders the above case be and the same is hereby dismissed without prejudice.

☐ Based on written motion of Pltfs counsel, court orders Deft to ans conc prop on ———— at ————

☐ Based on ——— motion of pltfs counsel, court orders Deft to show cause on ———— at ————

☐ Based on motion of pltfs counsel, pltfs ———— is amended and made returnable on ——— at ———

☐ It appearing to the court that a writ of garnishment was issued in the proper form and an answer filed stating that the garnishee is indebted to the defendant. It is ordered that the defendant have and recover of the garnishee ————————————

————————————————————

for the use and benefit of the plaintiff in the sum of $————.

The court rules as per memorandum decision on file herein.

IN THE DISTRICT COURT
OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

ORDER DENYING TEMPORARY
RESTRAINING ORDER OR
PRELIMINARY INJUNCTION—Filed May 8, 1978

Plaintiff's motion for a Temporary Restraining Order or Preliminary Injunction came on regularly for hearing before the Honorable David K. Winder, one of the Judges of this Court, on May 2, 1978. Plaintiff was represented by David S. Dolowitz, and Defendants were represented by Paul M. Tinker and Joseph P. McCarthy, Assistant Attorneys General.

From pleadings on file and from representations of counsel, the Court finds that plaintiff is a fifteen year old unmarried minor who resides at home with her parents and is dependent upon them for support. Plaintiff is pregnant and seeks to have an abortion performed. There has been no special showing of detriment which might result if her parents are notified except that plaintiff has alleged that she does not wish to inform her parents of her condition and believes that it is in her best inter-

est that her parents not be informed of her condition. The Court also finds that the identity of the parents is known to the physician or could be easily ascertained by said physician.

Plaintiff seeks to enjoin or restrain Defendants from enforcing the provisions of Section 76-6-304(2), Utah Code Annotated, 1953, upon the ground that it is unconstitutional under the Fourteenth Amendment of the Constitution of the United States and constitutes a violation of plaintiff's right to privacy and interferes with her physician-patient relationship in a legally impermissible manner, all in violation of her rights under 42 Utah Code Annotated, Section 1983.

The Court heard argument from counsel, carefully considered all cases cited, and concludes that while a State may not regulate or interfere with the decision of an *adult* woman and that of her physician to terminate an unwanted pregnancy during the first trimester of pregnancy, there is no decision binding upon this Court which precludes a State from enacting legislation of the kind involved here which in the case of a *minor* requires her physician to notify her parents before undertaking to perform an abortion upon her.

Now, therefore, it is hereby ORDERED that plaintiff's motion for a Temporary Restraining Order or Preliminary Injunction is denied.

Dated May 8, 1978.

By the Court:

/s/ David K. Winder
Judge

Mailing Certificate (omitted in printing)

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

ANSWER—Filed May 17, 1978

Defendants, Scott M. Matheson, Governor of the State of Utah, and Robert B. Hansen, Attorney General of the State of Utah, answer the allegations of plaintiff's complaint as follows in accordance with the numbering of the complaint.

1. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1, and therefore deny them.
2. Admitted.
3. Admitted.
4. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4, and therefore deny them.
5. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5, and therefore deny them.
6. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 6, and therefore deny them.

7. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7, and therefore deny them.

8. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8, and therefore deny them.

9. Defendants lack sufficient knowledge or information concerning plaintiff's desires concerning the appointment of a guardian ad litem in this case, and therefore deny the allegations of paragraph 9 in that regard. Defendants also deny the appropriateness of proceeding without a guardian ad litem in this case regardless of the desires of the plaintiff.

10. Defendants deny that this case presents a proper class action and specifically deny that the plaintiff can properly represent the interests of the proposed class.

11. No answer is required to paragraph 11, but to the extent that an answer may be deemed required, defendants' answers to paragraphs 1 through 10 are incorporated by reference.

12. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12, and therefore deny them.

13. Defendants agree that Section 76-7-304(2), Utah Code Annotated, 1953, requires that a physician notify the parents of a minor girl of her desire to have an abortion, but have no knowledge or information sufficient to form a belief as to plaintiff's specific desires in the matter, and therefore deny all other allegations of paragraph 13.

14. Defendants are unaware of plaintiff's beliefs as to her rights to have an abortion or the statements or representations made to her by her physician, and therefore deny all allegations of paragraph 14.

15. Denied.

16. No answer is required to paragraph 16, but to the extent that an answer may be deemed required, defendants' answers to paragraphs 1 through 15 are incorporated by reference.

17. Denied.

18. No answer is required to paragraph 18, but to the extent that an answer may be deemed required, defendants' answers to paragraphs 1 through 17 are incorporated by reference.

19. Denied.

20. No answer is required to paragraph 20, but to the extent that an answer may be deemed required, defendants' answers to paragraphs 1 through 19 are incorporated by reference.

21. Denied.

22. Denied.

AFFIRMATIVE DEFENSES

1. The complaint fails to state a cause of action upon which relief can be granted.

2. Plaintiff is required by terms of rule 17(b) to proceed, if at all, through a guardian ad litem.

3. The relief sought by plaintiff would, if granted, constitute an invasion of rights of persons not presently represented here and who should joined, including the parents of the minor child involved.

4. The challenged statute does not infringe upon any recognized right of a minor child.

5. The challenged statute merely restates a common law requirement concerning parental rights regarding major medical procedures.

WHEREFORE, defendants respectfully pray that the complaint be dismissed with prejudice.

Dated this 16th day of May, 1978.

/s/ Joseph P. McCarthy
JOSEPH P. MCCARTHY
Assistant Attorney General
Attorney for Defendants

/s/ Paul M. Tinker
PAUL M. TINKER
Assistant Attorney General
Attorney for Defendants

Mailing Certificate (omitted in printing)

[78] IN THE DISTRICT COURT
OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

REPORTER'S TRANSCRIPT

BE IT REMEMBERED that on Tuesday, May 30, 1978, at the hour of 11:00 A.M., the above-entitled cause came on regularly for hearing before the Honorable David K. Winder, Judge of the District Court, Third Judicial District, Salt Lake County, State of Utah and the following matters were heard.

* * * * *

[80] (IN CHAMBERS)

THE COURT: Let me get this on the record. This is the matter of H—— L—— versus Governor Matheson and others, Civil C78-2719. Present representing the plaintiff is Mr. David Dolowitz and representing the defendants is Mr. Joseph McCarthy and Mr. Paul Tinker.

This matter has been heard by me before and then it was continued to today. I guess your client is out here,

Mr. Dolowitz, and another lady? How do you want to proceed?

MR. DOLOWITZ: I thought that the Court and Counsel for the defendants wanted her to verify the statements that were in the Complaint made by her. It is my understanding that her identity can still remain secret and she can proceed under the name H—— L—— and I told her to respond only to that.

I would lead her through that and then we would go through the evidentiary portion in addition this afternoon.

THE COURT: What time are we figuring?

MR. DOLOWITZ: We are figuring for about 2:30. I have told Paul and Joe before we came in that there is one psychiatrist and one social worker I will be presenting as witnesses.

THE COURT: What are we looking at timewise?

MR. DOLOWITZ: I will have both of their testimonies in fairly quickly. It is a matter of cross-examination.

I want to show from them that there are circumstances where it is best where a minor, in terms of a physician, that the family not be notified and that the Utah Statute infringes on that relationship. It is not a matter [81] of theory, but in fact there are circumstances where a minor can and should be allowed to proceed on her own without an obligation to the parent.

THE COURT: They are talking in abstracts there. They never talked to her.

MR. DOLOWITZ: The counselor has talked to her and the only restriction I have there or reservation I have is that I have asked the counselor not to give out enough of the facts that would allow the family to identify her. I have indicated to you and to Joe and Paul on different occasions, her situation is dissimilar enough from what is normally thought of as being the situation that her family would identify her very quickly if the facts came out.

THE COURT: Who is the other lady?

MR. DOLOWITZ: She is my assistant, helping me.

THE COURT: Do you have any objection to proceeding this way?

MR. McCARTHY: Not generally. I would like to make it clear that we have no wish to discover her identity. I don't think that is necessary to the resolution of the case. I do think we may want to do a reasonably extensive examination of this girl, though, except in the areas of identification.

So the procedure suggested by Mr. Dolowitz is satisfactory as far as I can see.

THE COURT: All right. Why don't we have her come in and we will go from there.

(Whereupon two women entered Chambers.)

THE COURT: Could I have you stand and raise your hand to be sworn?

[82] (A lady was sworn by the Court.)

THE COURT: All right. Now, Miss, throughout this proceeding, I want you to be relaxed and be at ease here. Your identity is not going to be known by anybody and it is not going to be divulged in any way. If you think any question is asking you about your identity, don't answer it because even inadvertently or by mistake, we don't want you to divulge that.

You are going to be asked a number of other questions by Mr. Dolowitz and by the attorneys for the State of Utah about some other things. But keep your identity secret.

Could we have your assistant's name?

MR. DOLOWITZ: Kathy Garfield.

THE COURT: Go ahead, Mr. Dolowitz.

DIRECT EXAMINATION

BY MR. DOLOWITZ:

Q Ms. H —— L ——, you are a citizen of the United States, a resident of the State of Utah?

A Yes.

Q You know you were placed under oath?

A Yes.

Q You understand that means, in answering all of these questions, mine and those from the Attorney Gen-

eral's Office, you will be answering truthfully to the best of your ability all of the questions?

A Yes.

Q At the time that the Complaint in this matter was signed, you were pregnant?

[83] A Yes.

Q You had consulted with a counselor about that pregnancy?

A Yeah.

Q You had determined after talking to the counselor that you felt you should get an abortion?

A Yes.

Q You felt that you did not want to notify your parents—

A Right.

Q —of that decision? You did not feel for your own reasons that you could discuss it with them?

A Right.

Q After discussing the matter with a counselor, you still believed that you should not discuss it with your parents?

A Right.

Q And they shouldn't be notified?

A Right.

Q After talking the matter over with a counselor, the counselor concurred in your decision that your parents should be notified?

A Right.

Q You were advised that an abortion couldn't be performed without notifying them?

A Yes.

Q You then came to me to see about filing a suit?

A Right.

Q You and I discussed it as to whether or not you had a right to do what you wanted to do?

[84] A Yes.

Q You decided that, after our discussion, you should still proceed with the action to try to obtain an abortion without notifying your parents?

A Right.

Q Now, at the time that you signed the Complaint and spoke with the counselor and spoke with me, you

were in the first trimester of pregnancy, within your first twelve weeks of pregnancy?

A Yes.

Q You feel that, from talking to the counselor and thinking the situation over and discussing it with me, that you could make the decision on your own that you wished to abort the pregnancy?

A Yes.

Q You are living at home?

A Yes.

Q You still felt, even though you were living at home with your parents, that you couldn't discuss the matter with them?

A Right.

MR. DOLOWITZ: I think that would be those questions to support the allegations we put out in the Complaint.

THE COURT: Mr. McCarthy or Mr. Tinker?

MR. McCARTHY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. McCARTHY:

Q Just to keep this straight, I really don't wish to know who you are or in any other way identify you in the [85] record. So with this understanding, if necessary—for instance, what high school do you go to? I don't care if you are in high school. I don't care whether you are East, West or Jordan or wherever.

Let's start out this way. Are you still living at home?

A Yes.

Q Are you dependent on your parents?

A Yes.

Q All your money comes from them?

A Yes.

Q How old are you now?

A Fifteen.

Q Aside from the issue of abortion, do you have any reason to feel that you can't talk to your parents about other problems?

A Yes.

Q What are those reasons?

MR. DOLOWITZ: Now you are moving into the problem area that I indicated. If she starts to identify those reasons, they tie back into the reason why, if that gets out, the family would know exactly who she was because it is a very peculiar situation.

MR. McCARTHY: I think I am entitled to inquire.

THE COURT: How is it going to get out? We will seal this record. There is nobody in this room that—

MR. DOLOWITZ: If the case winds up being on appeal, it becomes a matter of public record as a transcript—

MR. McCARTHY: I think I—

MR. DOLOWITZ: —even if it is sealed.

[86] THE COURT: Let's talk one at a time.

MR. DOLOWITZ: In terms of turning around and filing with the Supreme Court, even if we attach an order to it that it is sealed, we still have to open it and refer to it in the process of handling the appeal.

THE COURT: How can we get into this issue? How can we find out the validity of her reasons without them being permitted to cross-examine her.

I mean, just for me to allow you what you want to ask Mr. Dolowitz, and then to cut them off on such a critical matter, I think—

MR. DOLOWITZ: I am having the counselor come in this afternoon and the counselor, at least, could give her opinion as to the same thing, whether or not there were valid reasons stated as far as the counselor is concerned in a professional opinion as to why that should not be given out.

THE COURT: What you are doing is that you are putting up a bar on some extremely critical testimony that I need to have and that you are cutting the Attorney General off from.

MR. DOLOWITZ: The problem is, as I view the Court's last statement and the question we are dealing with, is that the specifics of this case versus the rights of any person in here, and that is—

Is the Court saying you have to look at the specific reasons and determine whether or not they are valid? It is our position Constitutionally that she has the right to make that decision and if she has consulted with a counselor and the counselor concurs that those are valid reasons, why then—

THE COURT: What have we—what are we here for? I [87] have already ruled on that.

MR. DOLOWITZ: I assume it was to verify this. In terms of going beyond that, our point is that the specifics of the reasons are really irrelevant to the Constitutional issue.

THE COURT: As I say, I already ruled on that.

MR. DOLOWITZ: If you carry your ruling forward, you are in a position of rewriting the statute to say that a minor has to come forward and prove in court that there are valid reasons for being allowed to proceed without notifying the parents. And the statute either says you can't do that regardless of the reason and is therefore, in our opinion, unconstitutional, or there is a built-in exception to it that you are now creating that says this is true unless there are good reasons to the contrary. That, to me, makes the actual reasons irrelevant.

THE COURT: Well, what I felt in making the decision that I did is that, based on the record that was before me and having no particular reason from her and the other facts that I stated in my Memorandum Decision, that the statute was Constitutional. But I can conceive of a situation where a child probably wouldn't have to tell the parents.

MR. DOLOWITZ: In that case, that is saying that there is going to be a judicially created exception to the statute and I don't think that can be done. If I thought it could be done, I would have framed the Complaint that way.

So either the statute—if you are right and conceivably there are those reasons, then I think you should reconsider your decision because the statute is overbroad and Constitutionally infringes where it has no business. Under [88] Roe versus Wade and Doe versus Bolton where it says the doctor and patient can gather together

and going over those factors reach that decision themselves. And the specifics of what are the reasons, I think, becomes irrelevant. Either it exists that there are valid reasons why that can be done and in that case it is a case by case determination. But our statute doesn't say that.

THE COURT: But I don't see, Mr. Dolowitz, what the point of these hearings are today? What is the point of your having this in the record?

MR. DOLOWITZ: Right now, because I am trying to show the Court—partially because I am assuming that the State wanted verification that the allegations in the Complaint were true and that H—— L—— was a live person and not someone who had been fabricated.

THE COURT: I don't think they ever questioned that. I thought they acknowledged that, based on your integrity, that what you said in the Complaint was accurate. Didn't you acknowledge that?

MR. McCARTHY: We have no reason to doubt what Mr. Dolowitz alleged. The point in the cross-examination I am making is, I think the statute has tried to balance a parental interest here to the notification. If there is a condition underwhich there may be an exceptional circumstance that would occur where a parent shouldn't be notified, obviously, I think we have to get into the maturity of the child, validity of the reasons, especially when we don't have a parental point of view here in the testimony. We don't know what the parents think because they won't be here. We are getting a view of the parents through the child who has got a [89] serious problem.

I think if there is any point here at all in the examination, certainly we ought to be able to go into the depths of it.

THE COURT: Well, I think, if we are going to go into this at all, we have to go into it fully.

MR. DOLOWITZ: I am indicating that I have the expert coming in to testify and I know of the theories of cases they are going to present and the theories that they will present to the Court as to those circumstances and those cases where it is in the best interest of the minor that the minor should go ahead.

What I am saying is, in light of the Utah Statute, unless the Court is rewriting that statute, this is totally irrelevant as to what the reasons are because the statute makes only one exception and that is "if possible."

Now, if you are saying that if conditions exist that allow a physician to make that determination that it is not possible because of, let's just say, the family situation and you construe the statute that way, then it would be relevant. We would move away from the Constitutional issue. That is what I said in oral argument.

Now, if that is the meaning you are placing on the words "if possible," then my objection to irrelevancy would have to be withdrawn. If you are saying "if possible," is only a matter of physical—do you know the identity and can you actually reach them, that pivots around there. If "if possible" means, as far as you are concerned in interpreting this statute, that if there are reasons that they shouldn't be notified and the doctor can make that decision in con- [90] sulting with his patient that it is not possible to notify them, then this is a reasonable inquiry.

THE COURT: I understand that and I really haven't thought about that enough to make a ruling on something that important. But my point is this—

MR. DOLOWITZ: I think it is crucial for her right now.

THE COURT: I understand that. But I don't think you should be permitted to go into what you have been going into and then shut the door on the State.

I don't think there is any point in having the hearing this afternoon. I don't know what we are doing any of this for.

MR. DOLOWITZ: I think we are doing it to show that that statute is overbroad, which is something I have asserted to you in theory, in legal theory. I want to show you in fact that it is.

MR. TINKER: Within these facts?

MR. DOLOWITZ: I didn't bring up specific cases.

THE COURT: But the thing is, in order to go into some of the facts, it seems to me that you have got to go into all of the facts, not just the facts that you think

are appropriate or pertinent, because they have got to be able to cross-examine. You are going to be asking these experts this afternoon things that you are now shutting the door on them probing into here.

MR. DOLOWITZ: Because as far as I am concerned, this afternoon we are dealing with what is the whole class and we are dealing with experts who deal across the board. Right now, we are asking her opinion as to why she can't do it. She is not going to qualify as an expert. She is just going to say [91] her own personal reasons.

Now those reasons or the validity of them, unless this court is ruling that "if possible" means that the physician can listen to those reasons and determine that it is appropriate to go into it and then make the same determination as the Court is now being asked to make, the possibility—

I don't know if what I am saying is clear.

THE COURT: It is clear. I don't think "if possible" means that.

MR. DOLOWITZ: Then in that case, her particular reasons are irrelevant because the statute says they don't make any difference. It simply says "if possible." Do you know where they are? Can you reach them? If that is the interpretation, then any reason she might have for wanting to go ahead is not relevant because the statute says you can't go into it.

MR. McCARTHY: Then I see no point in taking any witness testimony whatever. There is no class certified in the first place. There is no ruling whether she is an appropriate representative of the class, none of these things.

THE COURT: I don't know why we are here, Sandy.

MR. DOLOWITZ: We are here because they asked to be here. I was willing to go ahead and close it and it was my understanding—

MR. McCARTHY: We were—

MR. DOLOWITZ: —wanted to go ahead.

THE COURT: One at a time, please.

MR. McCARTHY: I never objected to quitting winners, which I thought we were before today. I thought you wished to make a better record for appeal. This is the only reason [92] I am here, as far as I am concerned.

MR. DOLOWITZ: I was willing to make a cross-motion for Summary Judgment. I thought you wanted to go ahead. I was willing to accept the record and the judge's determination because I think we are right now at the heart of what the issue is because the issue is, can you go beyond a simple showing of minority and ability to contact the parents? If you can't, then the words "if possible" require a construction so that the doctor and the court can go beyond the statute and determine it.

If the doctor can decide that there are reasons why she should not contact a minor's parents, then that comes in only under the wording "if possible." And we don't have a Constitutional issue. Then, on that construction of the statute, if the Court determined that was the construction of the statute, the case doesn't need to go any further because the doctors can sit down and make that determination and go ahead. And I will even accept a dismissal of the case because, with that type of construction, we have established what I think the law reasonably is.

If, on the other hand, "if possible" means only physically possible, then we have a flat-out Constitutional issue. You have cut off any further inquiry and the specifics of the reason why should have to be left to the doctor and patient under the Bolton decision.

MR. McCARTHY: I think what we have now is a case in a very abstract posture with no facts. If you want to stand on that, that suits me fine.

THE COURT: There is no point in going beyond that.

MR. McCARTHY: I don't see any point in any testimony, [93] if that is where you want to stand.

MR. TINKER: I don't wish to appear quarrelsome, but I think it might be helpful to the Judge to go back and see just—at least my understanding or my recollec-

tion of why we are here this morning. After the previous hearing, my recollection is that you talked to us about the possibility of bringing in some expert witnesses to—I think your term was "to close the facts of the petition." And you inquired of us whether we would be willing to stipulate to the particular facts of this case. I discussed that with Joe and we said we were willing to allow some more evidence to come in, in terms of experts. But we were not willing to stipulate to all the facts in the Complaint. That is what occasioned, really, this morning's part of the hearing. The idea for this afternoon was your wish to get these experts in. That is my recollection.

If that is not accurate, I think it would be helpful to Judge Winder to clarify that.

MR. McCARTHY: I would say one thing further, if I may, and I think without this basic testimony, all the expert testimony in the world has nothing to do with what we are talking about.

MR. TINKER: That was essentially our reason for saying we couldn't stipulate to the facts in the Complaint as such. We felt there were facts there which needed to be in the record and our opportunity to cross-examine on those preliminary to any of that kind of testimony. I think that is essentially where we are hung up now.

MR. DOLOWITZ: I think it depends on a ruling from you, Your Honor, on what does "if possible" mean?

[94] THE COURT: I think "if possible," if he is able to physically contact them.

MR. DOLOWITZ: Then there is no relevancy to any other facts. Is that correct, under your interpretation of the law? It wouldn't make any difference if we brought in, not only H—— L——, but let's say dozens of girls and dozens of doctors and psychiatrists saying that you ought to go ahead; they can handle it and they can make the decision. That would be irrelevant because as far as you are concerned, "if possible" means physically locate. They have no right to go ahead under that statute. Is that a correct interpretation of your ruling?

THE COURT: I really—I would like to think about it because I haven't thought about it in terms of the "if possible." It just seems to me that, under circumstances that it might be Constitutional as relating to—and maybe I misconceived what it ought to be. But it might be Unconstitutional as it relates to a particular fact situation but Constitutional as it relates to another fact situation. But you don't press that theory. You think the only way you can get into a difference in the facts is under "if possible"?

MR. DOLOWITZ: That is right because the statute says, it says that before a doctor, in order to exercise his best medical judgment, before performing an abortion on a minor, he must notify, if possible, the parents of a minor. That wording is that he must do it.

I asserted to you in our prior argument that that has nothing to do with his medical judgment. That is an overbroad infringement and you said, "No, that is a valid exercise by the State.

[95] I am saying, if that is true, then the particular facts that come before him are irrelevant. The only escape clause in that language—and I use "escape clause" in quotation marks—is "if possible." That is vague and you received the interpretation that Judge Lewis made on that. He said he didn't know what it meant. When we argued it, I pointed out, if that means and is interpreted to mean only physically that he can do it, then there is no exception. He is told he has to do it for his exercise of his medical judgment. The specific facts of any individual case, no matter how ridiculous they are or how strong or weak they are, really become irrelevant.

Our position is that it is the doctor/patient relationship that is the key. If the doctor determines he should go ahead with the patient, then he should. The specific facts in any case, whether he is wrong or right, are Constitutionally protected to make that decision and go ahead and act on it. This is why I say it is irrelevant.

Now, if the determination that "if possible" means that if the doctor, after talking to the patient says, "Well, I really shouldn't do it and it is not possible to do it in terms of your best interest," then it would be irrelevant.

We could go into it but we wouldn't have a lawsuit because, at that point, then the doctor and the patient reached that decision.

I guess, if the State decides they are wrong in any case, they can come in and try to prosecute and the issue becomes whether or not that was the right determination. This is why your ruling, I think, on that has to decide.

THE COURT: Well, I don't see any point in going forward.

[96] MR. McCARTHY: Only one other question I think is material and I will submit it to you before I ask it. I think we have a right to inquire whether the witness is still pregnant, first of all, to meet the standard; and secondly, to be a proper class representative.

MR. DOLOWITZ: I am going to object to that. The Supreme Court in Doe versus Bolton and Danforth and in Griswold versus Kennecott said that this is a continuing controversy type of problem. If someone is going to be pregnant, it is going to end and it is irrelevant. We are not going to get to the U.S. Supreme Court in only nine months. It is only seven or eight months from the filing of the Complaint. It would be relevant if we were asking for a speedy decision. We are not asking for that anymore.

MR. TINKER: I would hope you were correct, but I am not convinced that "continuing controversy" is a valid doctrine in the State Court. I addressed that on oral argument.

THE COURT: I will sustain that objection. I don't think she has to answer that, but I don't see any point in going forward, Sandy.

MR. DOLOWITZ: If your ruling is that "if possible" is physical and there are no circumstances whatever that justify the violation of the statute, then the issue is closed. I think probably I ought to—we will have a transcript of this made up and attach it in the judgment to be entered.

THE COURT: All right.

MR. DOLOWITZ: It seems to me that closes all the legal issues. There is nothing left for me to do except to appeal it and see where we go from here. Because

that ruling does [97] close off all of the questions of fact, it would seem to me, or questions of law. The facts won't make any difference.

THE COURT: Well, that is the way that I interpret that statute now that that is brought more clearly to me than it was before. So I don't see any point in going forward.

MR. McCARTHY: Your Honor, as long as you still have a point or two to make, could we have a ruling on the necessity of a guardian being appointed here?

THE COURT: I don't think that a guardian has got to be appointed. I think that is a decision on the Constitutional issue, for all intents and purposes. If I made her have a guardian, it would notify the parents. So I will rule against you on that.

MR. McCARTHY: All right, fine. Thank you.

THE COURT: Well, I am sorry we weren't clear and put her to all this.

MR. DOLOWITZ: I knew this was a floating issue because the "if possible" hadn't been addressed in the Memorandum Decision. I thought this was a good way of clarifying it.

I agree with Paul that they wouldn't stipulate and I thought when this question came up, if there was going to be an inquiry as to the specifics of her reasons, that would most clearly—rather, be abstractly but in a concrete form—frame up the issue of what we are really facing and whether any facts in any case made any difference under the Utah Statute. I asserted to you in Court that it didn't and you now have ruled, right, it didn't.

In contrast, I said that makes it Unconstitutional and you said, "No."

MR. McCARTHY: I would like to make one more comment [98] for the record. When we are talking about minors, we are talking essentially about the fact that somewhere along the line, a person becomes an adult by a rather arbitrary ruling, age 18. Now I think if there are rights involved between parent and child in connection with abortion, I think maturity is a factor that would have to be considered and a great many other

things, which is what I think the point of factual testimony would be necessary to make this theory of Mr. Dolowitz's further down to the road.

MR. DOLOWITZ: I would agree with you about the facts if the Court ruled that the facts made any difference.

THE COURT: Thank you, gentlemen.

MR. McCARTHY: I think we all understand each other.

Reporter's Certificate (omitted in printing)

THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE
STATE OF UTAH

File No. C78-2719

H. L. on behalf of herself, ET AL. P

vs.

HONORABLE SCOTT M. MATHESON NP

COUNSEL:

David S. Dolowitz
Kathy Garfield
(S. D. Dolowitz's assistant)
Paul M. Tinker P
Joseph P. McCarthy P

L. J. Batey, Clerk	Hon. David K. Winder
Shirleyan Henderson, Reporter	Judge
William Hyler, Bailiff	Date: 5-31-78

The case comes now on regularly before the court for hearing. Parties appearing as shown above. H. L. is sworn and examined in behalft of the pltfs. Based upon courts own motion, the court orders that a guardian not be appointed. The court having considered, now being fully advised in the premises, orders that a judgment be entered as will be formalized in an order.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Dec. 26, 1978

The above-entitled matter came duly before the above entitled Court for trial on Wednesday, the 31st day of May, 1978, the Honorable David K. Winder presiding. The plaintiff was present in person and represented by counsel, David S. Dolowitz. The defendants were represented by counsel, Joseph McCarthy and Paul M. Tinker, Assistant Attorney Generals. The Court, after hearing the testimony of the plaintiff and having examined the records, files, papers and memoranda submitted on behalf of the respective parties and considering the arguments of counsel, now hereby makes and enters the following

FINDINGS OF FACT

1. The plaintiff is a citizen of the United States and a resident of the State of Utah.

2. Defendant Scott Matheson is the Governor of the State of Utah, and as such, under the Constitution and

laws of the State of Utah, has the duty and responsibility of enforcing the laws of the State of Utah. Article VII, Section 5, Constitution of the State of Utah.

3. Defendant Robert B. Hansen is the Attorney General of the State of Utah, and as such, under the Constitution and laws of the State of Utah, has the duty and responsibility of enforcing the laws of the State of Utah. Article VII, Section 18, Constitution of the State of Utah.

4. Plaintiff is unmarried, fifteen years of age, resides at home and is a dependent of her parents.

5. Plaintiff, H—— L——, was pregnant with an unwanted child in her first trimester of pregnancy at the time of the filing of the Complaint in this matter.

6. Plaintiff did not wish to inform her parents of her condition and believed it was in her best interest that they not be informed of her condition.

7. The plaintiff consulted with a counselor to assist her in deciding whether or not she should terminate her pregnancy. She determined, after consultation with her counselor, that she should secure an abortion, but was advised when consulting her physician that under the provisions of Section 76-7-304(2), Utah Code Annotated, 1953, that he believed along with her that she should be aborted and that he felt it was in her best medical interest to do so but he could not and would not perform an abortion upon her without informing her parents prior to aborting her because it was required of him by that statute and he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so.

8. Plaintiff desired that her identity not be revealed or made public because of matters involved in the instant action and accordingly requested this Court to permit her to proceed in this matter under the pseudonym H—— L——.

9. Plaintiff requested in this matter that she be allowed to represent a class in that the members of that class are so numerous that joinder of all members was impractical, and there were common questions of law and fact as to all members of the class and the claims of

H—— L—— as representative were typical of the claims of all members of the class.

From the foregoing Findings of Fact, this Court now makes and enters the following

CONCLUSIONS OF LAW

1. Plaintiff should be permitted to proceed in this matter without the appointment of a Guardian Ad Litem.

2. Plaintiff is an appropriate representative to represent the class she purports to represent.

3. The termination of the plaintiff's pregnancy would not moot this case.

4. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, which provides in relevant portion:

> To enable the physician to exercise his best medical judgment, he shall:
>
> * * *
>
> (2) notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

require the treating physician to notify if it is physically possible; that is, if he knows or can determine the identity of the parents of a minor and he is physically able to notify them, that he do so prior to the performance of an abortion upon a minor.

5. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, as thus interpreted are constitutionally valid and do not unconstitutionally restrict the right of privacy of a minor to secure an abortion or to enter into a doctor-patient relationship.

6. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, do not violate the provisions of Section 1983 of Title 42, United States Code, by effectuating an unconstitutional infringement upon the right of privacy of a minor seeking an abortion in the State of Utah nor of a minor to a doctor-patient relationship.

7. Judgment should be entered in favor of the defendants.

DATED this 26 day of December, 1978.

BY THE COURT:

/s/ David K. Winder
DAVID K. WINDER
District Judge

Certificate of Mailing (omitted in printing)

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

JUDGMENT—Filed Dec. 26, 1978

The above-entitled matter came duly before the above-entitled Court for trial on Wednesday, the 31st day of May, 1978, the Honorable David K. Winder presiding. The plaintiff was present in person and represented by counsel, David S. Dolowitz. The defendants were represented by counsel, Joseph McCarthy and Paul M. Tinker, Assistant Attorney Generals. The Court, after hearing the testimony of the plaintiff, having examined the records, files, papers and memoranda submitted on behalf of the respective parties, considering the arguments of counsel and having heretofore entered its Findings of Fact and conclusions of Law

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is permitted to proceed in this matter without the appointment of a Guardian Ad Litem.
2. Plaintiff is an appropriate representative to represent the class she purports to represent.

3. The termination of the plaintiff's pregnancy would not moot this case.

4. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, which provides in relevant portion:

> To enable the physician to exercise his best medical judgment, he shall:
>
> * * * *
>
> (2) notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

require the treating physician to notify if it is physically possible; that is, if he knows or can determine the identity of the parents of a minor and he is physically able to notify them, that he do so prior to the performance of an abortion upon a minor.

5. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, as thus interpreted, are constitutionally valid and do not unconstitutionally restrict the right of privacy of a minor to secure an abortion or a doctor-patient relationship.

6. The provisions of Section 76-7-304(2), Utah Code Annotated, 1953, do not violate the provisions of Section 1983 of Title 42, United States Code, by effectuating an unconstitutional infringement upon the right of privacy of a minor seeking an abortion in the State of Utah nor of a minor to a doctor-patient relationship.

7. The Complaint of the plaintiff is hereby dismissed.

DATED this 26 day of December, 1978.

BY THE COURT:

/s/ David K. Winder
DAVID K. WINDER
District Judge

Certificate of Mailing (omitted in printing)

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

NOTICE OF APPEAL—Filed Jan. 15, 1979

Plaintiff in the above-entitled matter hereby appeals the Order and Judgment of this Court dated the 26th day of December, 1978 as made and entered by the Honorable David K. Winder, one of the Judges of the above-entitled Court.

DATED this 11th day of January, 1979.

/s/ David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Plaintiff

Certificate of Mailing (omitted in printing)

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

Civil No. C-78-2719

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF

vs.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS

AFFIDAVIT TO PROCEED IN FORMA PAUPERIS

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, H—— L——, do solemnly affirm that owing to my poverty I am unable to bear the expenses of this action or the legal proceedings which I am about to commence, and I verily believe that I am entitled to the relief sought by such action and legal proceedings.

DATED this 27 day of April, 1978.

/s/ H L
H—— L——

Jurat (omitted in printing)

IN THE SUPREME COURT
OF THE STATE OF UTAH

No. 16249

H—— L——, on behalf of herself and all others similarly situated, PLAINTIFF AND APPELLANT

v.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, DEFENDANTS AND RESPONDENTS

OPINION—Filed December 6, 1979

MAUGHAN, Justice

Plaintiff, seeking declaratory and injunctive relief, initiated this action for the purpose of having Section 76-7-304(2) declared unconstitutional and to enjoin the enforcement thereof. The trial court found the provision constitutionally valid, and plaintiff appeals therefrom. The judgment is affirmed. All statutory references are to the 1953 Utah Code Annotated, as amended.

Plaintiff, a fifteen year old girl, alleged she was pregnant with an unwanted child. She asserted she was in her first trimester of pregnancy. She claimed she did not wish to inform her parents of her condition, and she believed it to be in her best interests not to impart such information to her parents. She averred, she was determined to secure an abortion after consultation with her counselor.

Plaintiff consulted her physician. He advised her, under Section 76-7-304(2), he could not and would not perform the abortion, without first notifying her parents.

Section 76-7-304, provides:

> To enable the physician to exercise his best medical judgment, he shall:
>
> (1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,
>
> (a) Her physical, emotional and psychological health and safety,
>
> (b) Her age,
>
> (c) Her familial situation.
>
> (2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

This provisions is part of the criminal code, as provided in Section 76-7-314(3). Such may be punishable by imprisonment for a term not exceeding one year, as provided in Section 76-3-204(1); together with a fine not exceeding $1,000, pursuant to Section 76-3-301(3).

Plaintiff proceeded in a class action, asserting the statute constituted an invasion of privacy of each member of the class, whom she represented. Specifically, she claimed the right of privacy encompassed the right to have an abortion, particularly in the first trimester of pregnancy, free from regulation or interference by the State of Utah. She urged the statute unconstitutionally infringed the right of privacy and thus violated the Fourteenth Amendment of the Constitution of the United States. She further asserted the statute was an overly broad regulation, which interfered with her right to consult freely with her treating physician, and to secure treatment, where appropriate, in the effectuation of an abortion without any compelling State interest in such regulation.

In its order denying a temporary restraining order, the trial court found plaintiff had made no special showing of detriment which might result if her parents were notified except for plaintiff's allegations she did not wish

to inform her parents, and believed it was in her best interests to withhold this information. The trial court further found the identity of the parents was known or could be easily ascertained by the consulting physician. The trial court concluded, while a State may not regulate or interfere with the decision of an adult woman, and that of her physician, to terminate an unwanted pregnancy during the first trimester, there was no binding decision, which precluded a State from enacting a legislative provision requiring a physician to notify the parents of a minor prior to performing an abortion.

The trial court entered a judgment, dismissing plaintiff's action. The trial court found plaintiff was unmarried, fifteen years of age, resided at home, was a dependent of her parents, and was in the first trimester of her pregnancy at the time her complaint was filed. The Court further ruled plaintiff was an appropriate representative to represent the class she purported to represent. The trial court interpreted Section 76-7-304(2) as requiring the treating physician to notify, if it be physically possible, viz., if he knows or can determine the identity of the parents of a minor, and he is physically able to notify them, that he do so prior to the performance of an abortion upon a minor. The trial court ruled, as thus interpreted, the statute was valid and did not unconstitutionally restrict the right of privacy of a minor to secure an abortion, or to enter into a doctor-patient relationship.

On appeal, plaintiff contends Section 76-7-304(2), as interpreted by the trial court, violates the Fourteenth Amendment of the Constitution of the United States. She urges, in the first trimester, the State cannot interfere at all with the fundamental interest of the pregnant woman in making an abortion decision in consultation with her physician. In the alternative, plaintiff contends this overly-broad regulation of the exercise of constitutionally protected rights can be so construed as to be valid. Specifically, plaintiff urges the term "if possible" be interpreted as conferring on the physician and patient the discretion to determine if medically, socially, psychologically, and physically it would be appropriate to notify the minor's parents.

In Roe v. Wade [1] the Court ruled the right of privacy, found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, is broad enough to encompass a woman's decision as to whether to terminate her pregnancy. This right of personal privacy, including the abortion decision is not unqualified and must be considered against state interests in regulation. However, a regulation limiting a fundamental right may be justified only by a compelling state interest. Furthermore, such legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

The Court ruled in Roe v. Wade,[2] with respect to the stage prior to approximately the end of the first trimester, "The attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."

It further held the State may place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The Court stated:

> . . . The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra professional are available.[3]

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[1] 410 U.S. 113, 153.

[2] 410 U.S. 163.

[3] 410 U.S. 165-166.

In the companion case of Doe v. Bolton [4] the Court ruled the abortion determination, so far as the physician is concerned, is made in the exercise of his best clinical judgment in the light of all the attendant circumstances. The physician may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him. His "medical judgment may be exercised in the light of all factors physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman."

The aforecited factors, which the physician may consider in making his best medical judgment were incorporated in subsection (1) of Section 76-7-304, the challenged statute. The notification provision of subsection (2) is substantially and logically related to the factors in subsection (1), for it is the parent of the minor, who would frequently possess additional information, which might prove invaluable to the physician in exercising his "best medical judgment." The notification provision merely gives the parents the option to respond and to consult with the physician and child. The statute does not confer a veto-power on anyone to overrule the determination of the doctor and his patient.[5]

Neither the *Roe* nor the *Doe* decision considered the issue of a pregnant minor seeking an abortion. In Planned Parenthood of Central Missouri v. Danforth [6] the Court ruled the State may not impose a blanket provision, requiring the consent of a parent or person in *loco parentis* as a condition for abortion of an unmarried minor during the first twelve weeks of her pregnancy. The Court explained the State does not have the constitu-

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[4] 410 U.S. 179, 191-192 (1972).

[5] The issue of parental consent for a surgical procedure on a minor child has not been presented to the court and will not be discussed.

[6] 428 U.S. 52, 74-75 (1976).

tional authority to give a third party an absolute, and possibly arbitrary veto over the decision of the physician and his patient, to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

The Court stated:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. [Citations] The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. [Citations] It remains, then, to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person in *loco parentis* that is not present in the case of an adult.

It was urged before the court the State had a substantial interest in safeguarding the family unit and parental authority. The court responded it could not conclude conferring a veto power on the parent would strengthen the family unit or enhance parental authority and control where the minor and nonconsenting parent were so fundamentally in conflict, and the existence of the pregnancy already had fractured the family structure.

> Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

The Court did qualify its holding by stating it had not suggested every minor, regardless of age or maturity, might give effective consent for termination of her pregnancy. The fault of the challenged Missouri statute was it imposed a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy;

and did so without a sufficient justification for the restriction, thus violating the strictures of *Roe* and *Doe*.

In Carey v. Population Services International[7] the Court cited Planned Parenthood and stated the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults. The Court reiterated the standard, that State restrictions inhibiting privacy rights of minors are valid only if they serve a *significant state interest*, which is not present in the case of an adult.

The concurring opinion of Justice Powell in Carey is of particular significance in an attempt to understand his opinion in the Court's most recent decision concerning a minor's right to an abortion, Bellotti v. Baird.[8] In Carey, he said:

> Requiring minors to seek parental guidance would be consistent with our prior cases. In Planned Parenthood, we considered whether there was 'any significant state interest in conditioning [a minor's] abortion [decision] on the consent of a parent or person in loco parentis that is not present in the case of an adult.' [Citation] Observing that the minor necessarily would be consulting with a physician on all aspects of the abortion decision, we concluded that the Missouri requirement was invalid because it imposed 'a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and [did] so without a sufficient justification for the restriction.' Ibid. But we explicitly suggested that a materially different constitutional issue would be presented with respect to a statute assuring in most instances consultation between the parent and child. [Citations]
>
> A requirement of prior parental consultation is merely one illustration of permissible regulation in this area. . . .[9]

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[7] 431 U.S. 678, 693 (1977).

[8] —— U.S. ——, 61 L.Ed.2d 797, 99 S.Ct. 3035, July 2, 1979.

[9] 431 U.S. 709-710.

In Bellotti v. Baird [10] the issues of consent and notification, where a minor desired an abortion, were inextricably intertwined. However, there is language in the main *opinion* which would appear to hold unconstitutional a statutory provision requiring parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests.[11]

Under the challenged statutory scheme in Bellotti, all minors were required to obtain the consent of both parents or in the alternative the consent of the court prior to procuring an abortion. If the minor elected to seek court consent, there was a mandatory notification of the parents of the pending court action. It was within this context Justice Powell ruled the blanket notification requirement unconstitutional. Significantly, a majority of the court refused to join in Justice Powell's opinion. Justice White dissented, and three Justices joined in the opinion of Justice Stevens, concurring in the judgment.

Justice Stevens stated:

> In short, it seems to me that this case is governed by Danforth; to the extent this statute differs from that in Danforth, it is potentially even more restrictive of the constitutional right to decide whether or not to terminate a pregnancy. Because the statute has been once authoritatively construed by the Massachusetts Supreme Judicial Court, and because it is clear that the statute as written and construed is not constitutional, I agree with Mr. Justice Powell that the District Court's judgment should be affirmed. Because his opinion goes further, however, and addresses the constitutionality of an abortion statute that Massachusetts has not enacted, I decline to join his opinion.[12]

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[10] Note 8, supra.

[11] At p. 818 of 61 L.Ed.2d.

[12] At p. 797 of 61 L.Ed.2d.

In an explanatory footnote, number 4, Justice Stevens stated:

> Until and unless Massachusetts or another State enacts a less restrictive statutory scheme, this Court has no occasion to render an advisory opinion on the constitutionality of such a scheme. A real statute rather than a mere outline of a possible statute—and a real case or controversy may well present questions that appear quite different from the hypothetical questions Mr. Justice Powell has elected to address. Indeed, there is a certain irony in his suggestion that a statute that is intended to vindicate 'the special interests of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child,' see ante, at ——, 61 L.Ed.2d 811, need not require notice to the parents of the minor's intended decision. That irony makes me wonder whether any legislature concerned with parental consultation would, in the absence of today's advisory opinion, have enacted a statute comparable to the one my Brethren have discussed.

In his dissent, Justice White stated:

> . . . Going beyond Danforth, the Court now holds it unconstitutional for a State to require that in all cases parents receive notice that thier daughter seeks an abortion and, if they object to the abortion, an opportunity to participate in a hearing that will determine whether it is in the 'best interests' of the child to undergo the surgery. Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.[13]

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[13] At p. 822 of 61 L.Ed.2d.

From the foregoing one cannot discern a clear constitutional doctrine inhibiting the State from enacting a statute, such as, Section 76-7-304(2), which merely provides for notification, if possible, of the parents of a minor contemplating an abortion.

Under *Danforth*, the issue then is whether the statute serves "any significant state interest" that is not present in the case of an adult, which would justify as a condition precedent to the obtaining of an abortion by a minor, the notification of her parents. First and foremost, the statute does not per se impose any restriction on the minor as to her decision to terminate her pregnancy. Second, as mentioned ante, the parent is in a position to provide valuable information concerning the factors which the physician may consider in exercising his best clinical judgment. Third, the State has a special interest in encouraging (but does not require), an unmarried pregnant minor to seek the advice of her parents in making the important decision as to whether or not to bear a child.

Justice Powell in his opinion in *Bellotti* stated there were "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing." [14] In expanding on this third reason, he observed, the guiding role of parents in the upbringing of their children justifies limitations on the freedom of minors. Further, it is a cardinal principle of this nation that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. He stated:

> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of

[14] At p. 807 of 61 L.E.2d.

> the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society, meaningful and rewarding. Under the Constitution, the State can 'properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's wellbeing are entitled to the support of laws designed to aid discharge of that responsibility.' [Citation] [15]

The Legislature in enacting Section 76-7-303(2) has strictly limited parental involvement in the minor's abortion decision. The provision does not confer on the parent an absolute and arbitrary veto, which was found impermissible in *Danforth.* There is no basis to conclude this provision unduly burden's the constitutional right of the minor woman, in consultation with her physician, to choose to terminate her pregnancy; thus, it is constitutional.

Plaintiff further urges the term "if possible" in subsection (2) of Section 76-7-304 be construed as conferring on the consulting physician discretion to determine if medically, socially, psychologically, and physically, it would be appropriate to notify the minor's parents.

There is no ambiguity in the term "if possible" within the context of subsection (2); and, therefore, there is no basis to construe the term beyond its literal, plain meaning.[16] The trial court's interpretation is consistent with the clearly expressed legislative intent, viz., the consulting physician must notify the parents, if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location and it is feasible or practicable to give them notification.[17] Furthermore, within the context of what is reasonable under the circumstances, the time element is an important factor, for

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[15] At pp. 810-811 of 61 L.Ed.2d.

[16] ". . . there is nothing to construe where there is no ambiguity in the statute." State v. Archuletta, Utah 529 P.2d 911, 912 (1974).

[17] See 20 Words and Phrases, 1979 Supplement, p. 8, "If Possible."

there must be sufficient expedition to provide an effective opportunity for an abortion.[18]

WE CONCUR:

J. ALLAN CROCKETT, Chief Justice

D. FRANK WILKINS, Justice

GORDON R. HALL, Justice

I. DANIEL STEWART, Justice

[18] Bellotti v. Baird, at p. 814 of 61 L.Ed.2d.

SUPREME COURT OF THE UNITED STATES

No. 79-5903

H. L., ETC., APPELLANT

v.

SCOTT M. MATHESON, ET AL.

ON CONSIDERATION of the motion of appellant for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

February 25, 1980

SUPREME COURT OF THE UNITED STATES

No. 79-5903

H. L., ETC., APPELLANT

v.

SCOTT M. MATHESON, ET AL.

APPEAL from the Supreme Court of Utah.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 25, 1980

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